Supreme Court, U.S.
FILED

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No. 00-

In the

Supreme Court of the United States

INVESTORS GUARANTY FUND LTD., an Exempt Limited Liability Company of the Islands of Bermuda,

Petitioner,

vs.

MORGAN STANLEY & COMPANY, INC., a Corporation of the State of Delaware, and JOHN DOES 1 through 10, being fictitious names for persons whose identities are unknown,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED TO THE COURT

1. Whether the standards summarily adopted by United States Court of Appeals of the Second Circuit by affirming the grant of summary judgment by the United States District Court for the Southern District of New York dismissing Petitioner's complaint were in direct conflict with controlling decisions of the United States Supreme Court because the district court (i) failed to view all evidence and draw all justifiable inferences in favor of Petitioner; (ii) made rulings of credibility and weight of conflicting affidavits in deciding a summary judgment motion; and (iii) shifted the burden of demonstrating all the elements of its claims to Petitioner without Respondent having made the requisite demonstration that there existed no genuine issues of material fact under Fed.R.Civ.P.56(c).

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The parties to the proceeding below were Petitioner, Investors Guaranty Fund, Ltd., an Exempt Limited Liability Company of the Islands of Bermuda, and Respondent, Morgan Stanley & Co., Inc., a corporation of the State of Delaware. Petitioner has no parent companies or subsidiaries required to be listed pursuant to Rule 29.6

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on November 1, 1999 and the decision below.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Second Circuit entered on November 1, 1999 summarily affirming the grant of summary judgment by the United States District Court for the Southern District of New York dismissing Petitioner's complaint which has not been reported but is reproduced in the Appendix hereto, pp. A-16-17.

The order of final judgment of the United States District Court for the Southern District of New York dated December 29, 1998 entered on the docket on December 30, 1998 is reproduced in the Appendix hereto, pp. A-1-2.

The order and opinion of the United States District Court for the Southern District of New York granting summary judgment dismissing Petitioner's complaint entered on December 23, 1998 is reproduced in the Appendix hereto, pp. A-3-15.

JURISDICTION

Invoking federal jurisdiction under 15 U.S.C. §1125(a)(1)(B), 28 U.S.C. §1367 and 28 U.S.C. §1331, the Petitioner brought this action in the United States District Court for the Southern District of New York. By an order and opinion dated December 23, 1998 and an order dated December 29, 1998 and entered on the docket on December 30, 1998, the United States District Court for the Southern District of New York dismissed all counts of Petitioner's complaint on Respondent's motion for summary judgment. See pp. A-1-2 and A-3-15, infra.

Petitioner timely appealed to the United States Court of Appeals for the Second Circuit. On November 1, 1999, that court entered a judgment and summary opinion affirming the decision of the Southern District of New York for the reasons set forth in the district court's opinion. See pp. A-16-17, infra. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Second Circuit is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1291, Final decisions of district courts, provides:

> "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a district review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title."

28 U.S.C. §1254, Court of appeals; certiorari; certified questions, provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

STATEMENT OF THE CASE

Petitioner, Investors Guaranty Fund, Ltd. ("IGF") developed and refined a specific and detailed system of securitization of risk (the "IGF Proprietary Technology") over a period of more than ten years. On June 12, 1995, IGF made a confidential disclosure of the IGF Proprietary Technology to Respondent, Morgan Stanley & Co., Inc. ("Morgan Stanley"). IGF also had meetings with other investment banks making similar confidential disclosures of the IGF Proprietary Technology.

On or about August 31, 1995, Morgan Stanley made a proposal to the California Earthquake Authority ("CEA") to securitize the risk of earthquakes. Morgan Stanley made five additional submissions to the CEA each progressively integrating more of the IGF Propriety Technology. Ultimately, Morgan Stanley was named lead underwriter on the project by the CEA, besting over 40 other investment banks. Morgan Stanley's accomplishment was widely reported and heralded in financial circles both here and abroad.

On May 10, 1996, IGF filed a complaint in the United States District Court for the Southern District of New York (the "Southern District Action") against Morgan Stanley. The complaint alleged violations of (i) Morgan Stanley's obligations of good faith and fair dealing; (ii) breach of express and implied contract; (iii) breach of constructive contract; (iv) tortious interference; (v) violation of 15 U.S.C. §1125 (a)(1)(B); (vi) common law unfair competition; and (vii) unjust enrichment. In its answer in the Southern District Action, Morgan Stanley admitted receipt of the IGF Proprietary Technology.

In December 1997, Morgan Stanley filed a motion for summary judgment in the Southern District Action. Morgan Stanley relied entirely upon affidavits of a single expert, Dr. Kenneth Froot, an academic. Dr. Froot submitted his conclusory opinion that the IGF Proprietary Technology was not "new and novel" under unspecified legal criteria on the ground that the August 31, 1995 Morgan Stanley proposal to the CEA allegedly contained elements present in nine other investment bank proposals to the CEA. Dr. Froot did not consider Morgan Stanley's later submissions to the CEA. In support of his opinion, Dr. Froot also excerpted four lines out of IGF's 12 page specification of the IGF Proprietary Technology, including references to written documents, thereby redefining the technology into broad generalizations, which he then claimed existed earlier. Having thus reduced the IGF Proprietary Technology, Dr. Froot gave his own description of four examples of other transactions in which he alleged technologies similar to those of IGF were employed, without providing any documentation or evidence supporting his description of these transactions.

In response, IGF submitted declarations of three of its principals who had extensive experience in securitizing risk detailing *inter alia* (i) that Dr. Froot only examined one of the six Morgan Stanley proposals submitted to the CEA ignoring later ones which were different and included much more of the IGF Proprietary Technology than the earliest; (ii) that Dr. Froot was under the misconception that none of the other investment banks whose proposals he compared had access to the IGF Proprietary Technology when in fact five had (including the two he characterized as most similar); and (iii) that Dr. Froot provided no documentation with respect to each of the alleged earlier transactions, that he had no actual knowledge of these transactions and that despite IGF's best efforts — no documents or person could be located to demonstrate or attest to the fact that some of these transactions ever took place.

Oral argument on the summary judgment motion was held on June 15, 1999. Two weeks after the hearing, IGF sought to file a supplemental submission including a declaration attaching two published case studies co-authored by Dr. Froot in September 1997 and March 1998. In these studies, Dr. Froot described the elements contained in the IGF Proprietary Technology as "new and novel" in 1997 and 1998, rather than "old in the art" in 1995 as he had represented in his affidavits filed with the district court. IGF also sought to file the full 12 page answer to the interrogatory from which Dr. Froot had excerpted his four elements.

On December 23, 1998, the district court issued an opinion and order granting summary judgment in favor of Morgan Stanley. In its opinion, the district court adopted the opinion of Dr. Froot as its own holding: (i) that the IGF Proprietary Technology was not novel or original; (ii) that it conferred no competitive advantage on Morgan Stanley; and (iii) denied IGF's motion to supplement the record, denying IGF the opportunity to introduce the full answer to the interrogatory explaining the IGF Proprietary Technology and presenting evidence of Dr. Froot's earlier published opinions directly conflicting with his affidavit opinion that IGF's Technology was not "new and novel." In rendering its decision, the district court essentially dismissed virtually everything asserted by IGF's principals on grounds of weight and credibility and drew no inferences in favor of IGF. These rulings were incorporated in a final judgment entered on December 30, 1998.

A timely appeal was filed before the United States Court of Appeals for the Second Circuit. In a summary opinion dated November 1, 1999, the Court of Appeals affirmed the district court's decision, adopting the reasons stated by the district court for its written opinion dated December 23, 1998.

REASONS FOR GRANTING THE WRIT

Based Upon The Reasoning Used In Deciding Respondent's Summary Judgment Motion, The Courts Below Applied Standards In Direct Conflict With Controlling Decisions Of This Court.

The Courts below in granting and affirming summary dismissal of Petitioner's complaint employed standards for the grant of summary judgment in direct conflict with prior controlling decisions of this Court. Summary judgment epitomizes the tension between the right to a fair trial guaranteed by the Constitution and the right of the judicial system to protect itself from the burden of meritless claims. There is no constitutional right to summary judgment nor a right to deny a litigant a fair trial merely to relieve the judicial system of unimportant issues or litigants or litigation with less than strong claims.

To insure a balance between these tensions, this Court has developed a detailed and carefully conceived body of law governing the grant of summary judgment. Among this Court's dictates are: (i) that all evidence of the non-moving party is to be believed and that all reasonable inferences are to be drawn in favor of the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L.Ed. 2d 202, 216, 106 S.Ct. 2505 (1986); (ii) that judges are not to make credibility judgments at the summary judgment stage; (*Id.*); and (iii) that movants must demonstrate the absence of a genuine issue of material fact under Fed.R.Civ.P.56(c) before the burden shifts to the non-movant to demonstrate all the elements of its causes of action. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L.Ed. 2d 265, 106 S.Ct. 2548 (1986).

In the instant case, the Courts below gave but mere lip service to these requirements. However, the opinion of the district court adopted by the Court of Appeals for the Second Circuit applied none of these. Such conduct threatens the supremacy of the Supreme Court, creates a *de facto* conflict among the circuits and makes results a function of the court's location, rather than governing law. Worst of all, it creates the appearance of short-shrift justice.

The issue of short-shrift justice at the Court of Appeals level has been raised by the public media. On March 14, 1999, the New York Times published an article entitled *Caseload Forcing Two Level System for U.S. Appeals,* written by William Glaberson. This article spoke about the limited review cases are now getting at the circuit court level. The article stated that because the number of appeals has increased while the number of judges remains constant, the level of review is much less critical than it has been previously and cases are often decided by recommendations of non judges, such as full time staff attorneys. *See* William Glaberson, *Caseload Forcing Two Level System for U.S. Appeals*, New York Times, March 14, 1999, §1 at p.1, col. 6.

The article further cited the relatively new practice of the circuit court issuing an opinion merely stating that the district court opinion is "affirmed" without any amplification on the record for the reasons why. This practice the article claims decreases the litigant's understanding of the circuit court's opinion as well as its opportunity for review by this Court thus damaging the litigant's rights. *Id.* Whether the courts truly provide a fair hearing is as much a matter of public perception as it is a matter of fact. Petitioner respectfully submits that the Supreme Court should grant this Petition for a Writ of Certiorari to insure compliance with its controlling law and put an end to short-shrift justice at the altar of case disposition.

A. The Southern District And Consequently The Second Circuit Did Not View The Evidence In A Light Most Favorable To IGF Nor Draw All Justifiable Inferences In IGF's Favor.

In deciding whether there is a genuine issue of material fact, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255, 91 L.Ed. 2d at 216, c*iting Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59, 26 L.Ed. 2d 142, 90 S.Ct. 1598 (1970).

The district court and consequently the Court of Appeals did just the opposite, by resolving not only all reasonable inferences against IGF but also credibility and weight by adopting wholesale the opinions of Dr. Froot, while disregarding in their entirety the declarations submitted by IGF. In footnote 2 of the district court's opinion, the district court states: "The facts submitted by defendant for this motion are contained entirely in Dr. Froot's affidavits." (A-7). The district court then dismissed the declarations of IGF principals, themselves experts, in that same footnote, stating: "plaintiff challenges the expert qualifications of Dr. Froot, although it does not appear that plaintiff has any grounds for the challenge. IGF did not depose Dr. Froot nor does it submit affidavits from its own disinterested expert." (*Id.*). The district court ignored the conflicting facts and opinions of IGF's experts reducing them to nothing more than a challenge to Dr. Froot's expertise rather than what they were, a challenge to his allegations of fact and conclusory opinion that IGF's Proprietary Technology was not "new and novel." This was trial by conflicting expert's affidavits, wherein the district court made summary findings of fact based on its assessment of the weight and credibility to be accorded those conflicting affidavits.

As a further example, the district court adopted Dr. Froot's conclusions as to the content of the alleged four earlier catastrophic bond references cited by him, (Lehman Bros./Electrolux, Nationwide, Guy Carpenter/Normandy Reinsurance and AIG Financial) while disregarding IGF's expert's conflicting assessment of such content as "empty assertions by one of plaintiff's own principals" (A-7-8). Further, the district court found no merit in the IGF Rule 56(f) declaration that neither Dr. Froot nor Morgan Stanley had provided IGF with any documentation relating to the transactions upon which he relied so that IGF could be sufficiently informed as to the actual facts rather than merely Dr. Froot's interpretations and opinions. (A-8) In footnote 3, the district court criticized plaintiff's descriptions disclosed by its own investigation of these transactions as "too cursory to be given weight" and characterizes IGF's description of such transactions as "hearsay and is disregarded." (A-8-9).

As a further example, the district court disregarded IGF's lengthy and detailed reiteration of the IGF Proprietary Technology in favor of Dr. Froot's four point reduction of IGF's 12 pages and referenced documentation. (A-11). Again, the district court simply dismissed Dr. Love's rebuttal affidavit. (A-11) Still again, the district court accepted Dr. Froot's assertion that other securities available in 1995 had the same characteristics as IGF's Propriety Technology as against Dr. Love's affidavit to the contrary. (A-10-11). The district court also dismissed the fact that Dr. Froot had analyzed only one of Morgan Stanley's submissions of the six made to the CEA and IGF's demonstration that subsequent submissions progressively integrated more of the IGF Proprietary Technology. (A-10, footnote 5). This it characterized as "a conclusory, self-serving assertion by one of Plaintiff's principals, and does not raise a genuine issue of material fact." (*Id.*)

Finally, in disposing of these issues, the district court stated:

> While it may be the case that IGF owns some measure of proprietary technology with respect to securitization of catastrophic risks, nothing on the record in this case indicates that. And though Defendant has focused its analysis on a small aspect of IGF's interrogatory response, that is all that was required here, as the remainder of that response adds no detail or helpful explanation. Quite simply, IGF has failed to articulate precisely what proprietary technology it had which Morgan Stanley allegedly misappropriated. (A-11)

The court ignored IGF's explanation that only the title of this case study was buried in numerous pages of Dr. Froot's past publications, so typical of resumes of academics. This was hardly fair notice to IGF. Thus, the district court virtually conceded that it had made findings of fact and assessed the weight and credibility of affidavits without any oral testimony let alone a trial to a jury as demanded by Petitioner.

With respect to competitive advantage, the district court found as fact based solely on Dr. Froot's affidavit that two other banks, CS First Boston and Goldman Sachs made proposals to the CEA that contained "all relevant characteristics of the IGF System" and thus concluded there was no competitive advantage. (A-12) The district court dismissed the declarations of both Douglas King and Dennis Szal that both these banks along with at least three others in Dr. Froot's analysis were provided with IGF Propriety Technology in confidence prior to their submission to the CEA, stating that IGF "had offered no evidence to that argument other than the statements of its principals." (A-12-

13). Again, the court made a finding of fact based on its assessment of the credibility and weight to be accorded conflicting affidavits. As further example, the district court chose to disregard the King declaration which in detail set forth the differences between those proposals and the IGF Proprietary Technology. (A-13)

In denying IGF's motion to supplement the record, the district court refused to accept Mr. King's July 1, 1998 declaration with exhibits showing inconsistencies between Dr. Froot's affidavits and published case studies prepared by Dr. Froot. (A-14) In denying the additional submission, the district court seized upon a single phrase taken from one paragraph of the supplemental declaration that asserted: "deals involving true risk transfer, a principle element of IGF's proprietary technology, first occurred in 1997, not 1995." (*Id.*). In refusing to accept this submission the court stated:

> The issue here is whether the concept was novel, not whether deals involving the concept had been consummated. Furthermore, one of the case studies was listed on Dr. Froot's resume which was made available to IGF in December 1997, and the other was published in March 1998, well prior to argument. (*Id.*).

The district court rejected the full set of IGF's answers to interrogatories describing IGF's Proprietary Technology without any discussion of the substance of the full answers or the issues raised at the oral argument, saying: "The full interrogatory answers are neither helpful to the court or supportive of Plaintiff's opposition in opposition to Defendant's summary judgment motion." (A-15)

IGF respectfully submits that the above actions of the district court support IGF's position that while giving "lip service" to controlling decisions of this Court, the district court applied standards in direct conflict with those decisions. The district court made findings of operative fact based upon its assessment of the weight and credibility of conflicting affidavits, drawing no reasonable inferences in favor of IGF. The Court of Appeals compounded the district court's error by summarily adopting its opinion.

B. The Southern District And Second Circuit Made Assessments of Credibility Which Are The Exclusive Province Of A Jury.

This Court has stated that a judge is not to rule on credibility when deciding a summary judgment motion. "[Summary judgment] by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." *Anderson v. Liberty Lobby,* 477 U.S. at 255, 91 L.Ed. 2d at 216.

As demonstrated by their credentials set forth in their respective declarations filed in the district court, both Dr. Love and Douglas King qualify as expert witnesses under FRE 702. That rule provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Douglas King, Chairman of the Board of IGF has ten years hands-on experience in the design, development, implementation and marketing of the IGF Proprietary Technology. Still further, he has extensive experience in the design, development and marketing of insurance and alternative risk systems.

Similarly, Douglas A. Love holds a Ph.D. (Economics) from Columbia University; an MBA (Finance) from New York University and a BME (Industrial Engineering from Cornell University). Among other highlights in his career, Dr. Love is a registered Investment Advisor with the SEC, has served as a project manager for the Council of Economic Advisors for the White House; a Senior Management Consultant at Arthur Little Inc. and has been a consultant to the Pension Benefit Guarantee Corporation. Further, Dr. Love has been involved as chairman, managing director and president in various organizations dealing in equities, fixed income, derivative strategies and securities. Still further, Dr. Love has taught at both New York University and Rutgers University Business Schools and is widely published author of financial publications.

Although IGF demonstrated that its principals were experts with impressive hands-on experience under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93, 125 L.Ed. 2d 969, 1135 S. Ct. 2786 (1993), the district court made credibility assessments in favor of Morgan Stanley's expert, Dr. Froot, an academic with no practical experience in the relevant technology.

Moreover, the opinion of the district court supports a conclusion that the opposing declarations of both Douglas King and Dr. Love were treated as effectively inadmissible or their weight and credibility miniscule merely because they were not "disinterested experts". (A-7) Obviously, this constitutes impermissible assessment of the weight and credibility of conflicting affidavits. The Court likewise characterized Dr. Love's rebuttal of Dr. Froot's assertion of early CAT bond transactions as "empty assertions by one of Plaintiff's own principals..." (A-9) The Court later characterized Dr. Love's opinion that other financial instruments did not embody the IGF Proprietary Technology as an "assertion without evidentiary support" ignoring the

detailed explanatory support in the affidavits of both Dr. Love and Dr. King. (A-10-11) Still further, when IGF pointed out that Dr. Froot only analyzed one of six submissions to the CEA and that each later submission integrated more of the IGF Proprietary Technology, the Court mischaracterized this as "a conclusory self-serving assertion by one of Plaintiff's principals."(A-10, footnote 5)

Finally, the district court in substituting its own judgment for that of the jury chose to disregard all IGF's affidavits, the full answers to its interrogatories, the elements of the IGF Proprietary Technology set forth in the complaint (and described in detail the IGF's answers to interrogatories), in determining the ultimate issue of fact by stating: "[q]uite simply, IGF has failed to articulate precisely what proprietary technology it had which Morgan Stanley allegedly misappropriated." (A-11) However, the district court seemed satisfied with Dr. Froot's reductionistic articulation of what he claimed to be the IGF Proprietary Technology but chose to ignore both IGF's 12 page full articulation as well as Dr. Love's and Mr. King's detailed explanation of the differences between it and the transactions cited by Dr. Froot. Moreover, the district court accepted Dr. Froot's representation as to the nature and character of these other transactions without any documentary evidence. (A-7-8)

The district court and the Court of Appeals by summarily affirming the reasoning of the district court made findings of fact in conflicting affidavits by impermissibly assessing both the credibility of the affidavits and the weight to be given to these affidavits in direct conflict with the controlling law of this Court.

C. Morgan Stanley Did Not File A Properly Supported Motion For Summary Judgment.

The district court and in affirming its decision, the Court of Appeals for the Second Circuit impermissibly shifted the burden to IGF to demonstrate all of the elements of its causes of action. Under Fed.R.Civ.P.56(c) "the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Under the controlling law of this Court, only after the movant has satisfied its burden of filing a properly supported summary judgment motion, as defined by this rule, does the burden shift to the non-movant to demonstrate all the material elements of its causes of action. *See Celotex*, 477 U.S. at 323, 91 L.Ed. 2d at 274.

Although there is no requirement for the filing of affidavits in support of a summary judgment motion, Morgan Stanley chose to file four affidavits of a single expert, two accompanying the moving papers and two in rebuttal to satisfy this burden.

In response to Dr. Froot's affidavits, IGF submitted declarations of its own which *inter alia* demonstrated why Morgan Stanley had not met its initial burden of filing a properly supported summary judgment motion. IGF pointed out (i) that Dr. Froot had analyzed only one early submission by Morgan Stanley to the CEA, out of six, and that each subsequent submission increasingly utilized more of the IGF proprietary technology; (ii) that the basis of Dr. Froot's opinion, that the IGF technology was old in the art because some general elements of it appeared in other investment bank's proposals to the CEA, was flawed in methodology because of piecemeal reconstruction by hindsight of elements

taken selectively from such proposals and because five of those banks, including the two he characterized as most similar, had been given confidential disclosures by IGF; (iii) that Dr. Froot had no personal knowledge of any of the transactions that he cited for the proposition that IGF's technology had been used before; and (iv) that Dr. Froot improperly redefined the IGF technology based upon his interpretation of four elements from a 12 page answer to an interrogatory.

After oral argument but before the opinion was issued, IGF attempted to supply and direct the district court to two case studies authored by Dr. Froot. In these case studies, Dr. Froot described the elements of the IGF Proprietary Technology in 1997 and 1998 as new and different from anything previously developed and used in the field of securitization of risk.

Despite the evidence that Dr. Froot's theories were made on incomplete and incorrect knowledge with flawed methodology, that he failed to consider additional Morgan Stanley submissions to the CEA, and that he had taken contrary positions when he was not being paid by Morgan Stanley, the district court shifted the burden of proof to IGF to demonstrate the elements of its claims. The district court then held that IGF had never adequately described the IGF Proprietary Technology despite IGF's 12 page description and the affidavits of Dr. Love and Mr. King. (A-11)

IGF argued on appeal (appeal reply brief at pp. 4-9) that the IGF Proprietary Technology was set forth in the full 12 page response to an interrogatory, which was impermissibly reduced to four elements by Dr. Froot and that the district court never critically evaluated the Froot affidavits to establish that they "demonstrated that the standard for the summary judgment under Rule 56(c) is satisfied". *Cetolex*, 477 U.S. at 323, 91 L.Ed. 2d at 294. Obviously, Morgan

Stanley failed to demonstrate that there was no genuine issue of material fact. Opinions of an expert are not fact. An expert's description of prior transactions without documentation and largely based on characterizations of undocumented fact cannot shift the burden. Instead of performing its required analysis, the district court simply adopted Dr. Froot's opinion while rejecting everything to the contrary asserted by IGF. This failure by the district court to properly evaluate whether Morgan Stanley's submissions satisfied its burden under 56(c) of demonstrating no genuine issue of material fact before shifting the burden to IGF of demonstrating all elements of its claims and its subsequent adoption by the Court of Appeals are directly contrary to controlling decisions of this Court.

CONCLUSION

For all of the reasons stated above, the Petition for Certiorari should be granted.

Respectfully submitted,

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Dated: January 28, 2000

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INVESTORS GUARANTY FUND, LTD., an Exempt Limited Liability Company of the Islands of Bermuda,

Plaintiff,

– against –

MORGAN STANLEY & CO., INC., a corporation of the State of Delaware, and JOHN DOES 1 Through 10, being fictitious names for persons whose identities are unknown,

Defendants.

96 Civ. 3520 (RPP)

JUDGMENT

Defendant Morgan Stanley having moved for summary judgment pursuant to Fed. R. Civ. P. 56; plaintiff having moved to file supplemental papers; and the matter having been come before the Honorable Robert P. Patterson, United States District Judge, and the Court on December 23, 1998 having rendered its Opinion (81705) and Order granting defendant's motion for summary judgment, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion (81705) and Order, dated December 23, 1998, defendant's motion for summary judgment is hereby granted; accordingly, judgment is entered in favor of the defendant.

Dated: New York, New York
December 29, 1998

James M. Parkison
Clerk of Court

BY: /s/
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INVESTORS GUARANTY FUND, LTD., an Exempt Limited Liability Company of the Islands of Bermuda,

Plaintiff,

96 Civ. 3520 (RPP)

– against –

MORGAN STANLEY & CO., INC., a corporation of the State of Delaware, and JOHN DOES 1 Through 10, being fictitious names for persons whose identities are unknown,

Defendants.

OPINION AND ORDER

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ROBERT P. PATTERSON, JR., U.S.D.J.

Defendant Morgan Stanley & Co., Inc. ("Morgan Stanley") brings this motion for summary judgment pursuant to Rule 56 at the close of discovery. Plaintiff Investors Guaranty Fund, Ltd. ("IGF") has several claims against Morgan Stanley: breach of express contract; breach of implied contract; breach of constructive contract; tortious interference; unfair competition; and unjust enrichment; and a claim for a violation of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B). For the following reasons, Defendant's motion is granted.

Also before the Court is Plaintiff's post-argument motion to file supplemental papers as part of its opposition to Defendant's motion for summary judgment. That motion is denied.

BACKGROUND

On November 1, 1995, the California Treasurer's office wrote to various investment banking firms to solicit bids to provide underwriting services to the state of California and said:

> The firm(s) selected will participate in developing a plan of finance and then underwriting a portion of the initial capitalization of the California Earthquake Authority (the "CEA"), a privately funded/publicly managed risk pool established by [California Insurance] Commissioner Quakenbush to provide earthquake coverage for residential property throughout California.

(Coch Decl. Ex. B). Defendant Morgan Stanley submitted a proposal on November 15, 1995, in response to California's solicitation. (Froot 11/5/97 Aff. Ex. B.)[1] This proposal is at the heart of this lawsuit. Plaintiff's complaint essentially alleges that in its CEA proposal Morgan Stanley misappropriated IGF's "total integrated system" for the securitization of large or rare insurance risks.

IGF's purported "total integrated system" is said to convert risks which are not easily placed in other markets into standardized contractual units which can be acquired by capital market investors, such as "catastrophe bonds." (Coch Decl. Ex. A at 4-5). According to IGF, its system contains four elements or characteristics: "a) the securitization of risk, i.e. converting specific insurance risks into capital market securities; b) collateralizing risk transfer, i.e. sufficient collateral to pay claims on risks transferred; c) a conversion platform, i.e. a device for accepting and diversifying unique risks; and d) an absorption security, i.e. a security designed to absorb risk over time." (*Id.* at 6-7).

Defendant contends that all counts of Plaintiff's complaint depend on the existence of a proprietary right to the information that was allegedly misappropriated. According to Morgan Stanley, IGF did not have a proprietary right to the information that forms the basis for its system because (1) the idea behind the system was not novel or original in June 1995, the time at which the information was allegedly passed by IGF to Morgan Stanley, and (2) IGF did

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[1] Dr. Kenneth A. Froot has submitted four affidavits as part of this motion. The two affidavits submitted in conjunction with Defendant's motion and memorandum of law in support of the motion will be designated as "Froot 11/5/97 Aff." and "Froot 12/17/97 Aff." The two affidavits submitted in conjunction with Defendant's reply memorandum of law will be designated as "Froot 4/15/98 Repl. Aff." and "Froot 4/17/98 Repl. Aff."

not have an actual or potential competitive advantage over others based on its "total integrated system."

DISCUSSION

I. Defendant's Motion for Summary Judgment

A. *Standard for Summary Judgment*

The Second Circuit has summarized the standards for granting summary judgment as follows:

> First, summary judgment may not be granted unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P.56(c). Second, the burden is upon the moving party to demonstrate that no genuine issue respecting any material fact exists. In considering that, third, all ambiguities must be resolved and all inferences drawn in favor of the party against whom summary judgment is sought. Fourth, the moving party may obtain summary judgment by showing that little or no evidence may be found in support of the nonmoving party's case. When no rational [factfinder] could find in favor of the nonmoving party because the evidence to support its case is so slight, there is no genuine issue of material fact and a grant of summary judgment is proper.

Gallo v. Prudential Residential Svcs., 22 F.3d 1219, 1223-24 (2d Cir. 1994) (citations omitted).

A. *Novelty and Originality*

Absent "novelty and originality" there can be no recovery under any New York cause of action for a defendant's unauthorized use of confidentially disclosed information. *Hudson Hotels Corp. v. Choice Hotels International*, 995 F.2d 1173, 1178 (2d Cir. 1993); *Granoff v. Merrill Lynch & Co., Inc.*, 775 F. Supp. 621, 627 (S.D.N.Y. 1991) (quoting *Downey v. General Foods Corp.*, 286 N.E.2d 257 (1972)), *aff'd* 962 F.2d 2 (2d Cir. 1992). Therefore, all of plaintiff's causes of action, which are based on the proposition that plaintiff had a valid property right in the information revealed, must be dismissed unless there is a genuine issue as to the novelty of plaintiff's idea. It is insufficient for plaintiff to merely assert the novelty of the idea. Instead, plaintiff must provide a factual basis for that contention. *Id.*

Defendant presents three arguments for why the ideas that constitute Plaintiff's "system" were in the public domain before they were shared with defendant in June 1995: (1) prior to June 1995 there had been at least four offerings of catastrophic bonds; (2) an academic article containing all the concepts alleged to be proprietary by IGF was circulated for peer review in May 1995; and (3) various financial products containing the allegedly proprietary elements were available prior to June 1995.

First, through its expert Dr. Froot[2], Morgan Stanley provides four examples of earlier catastrophe bond offerings. In 1990, Lehman Brothers underwrote a private placement of fixed income securities for Electrolux to cover Japanese

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[2] The facts submitted by Defendant for this motion are contained entirely in Dr. Froot's affidavits. Plaintiff challenges the expert qualifications of Dr. Froot, although it does not appear that plaintiff has any grounds for the challenge. IGF did not depose Dr. Froot, nor does it submit affidavits from its own disinterested expert.

earthquake risk. In 1994, Nationwide Mutual Insurance Co. sold contingent surplus notes, which are securities whose payments of interest and principal were linked to the level and timing of catastrophic losses. Also in 1994, Guy Carpenter, Inc. established Normandy Reinsurance Co. Ltd. as a Bermuda-based company to design and market financial products that could be used to cover catastrophe risks. And earlier in 1995, AIG Financial Products proposed a bond linked to catastrophic losses as measured by Property Claims Services, which measures U.S. property losses from events such as earthquakes and hurricanes. (Froot 12/17/87 Aff. ¶8(a)-(d); Froot 4/17/98 Repl. Aff. ¶¶ 17-21).

Instead of analyzing these transactions in an attempt to show that they did not contain elements of its proprietary system, IGF instead complains that Morgan Stanley did not provide enough information about the transactions to enable IGF to analyze them properly. (Pl. Mem. at 22.) IGF has filed a Rule 56(f) declaration stating that it cannot adequately address Morgan Stanley's arguments without "materials relating to those transactions." (Pl. 56(f) Stmt. ¶ 3). However, Plaintiff never sought discovery on those transactions, despite having Dr. Froot's affidavit since December 17, 1997, and despite being afforded a one-and-a-half month period for expert discovery. (7/2/97 Joint Discovery Plan ¶ 4.) Moreover, IGF does not specify in detail why it disagrees with Morgan Stanley's analysis, but merely states in general terms that IGF's system is different. (Love Decl. ¶ 25).[3] For

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[3] Federal Rule of Civil Procedure 56(e) requires that facts set forth in affidavits filed in conjunction with a motion for summary judgment be based on admissible evidence. With respect to the Lehman Brothers/Electrolux transaction, IGF says it could find no proof that such a deal ever existed, but it does not present any admissible evidence on this point (such as an affidavit from an employee of Lehman Brothers). Nor did it conduct discovery of Dr. Froot designed to show that such a deal did not exist. Dennis Szal, a managing director at IGF and assistant to the chairman, states in his affidavit, "I have several contacts at Lehman Bros. in New York, whom I have asked about this transaction. None

example, with respect to the Nationwide Mutual transaction, Douglas Love, IGF's chief investment officer, states that the "contingent surplus notes were designed to prefund a loan to Nationwide in the event of excess covered losses and are materially different from securities which pass catastrophic risk through to capital market investors, nor did they contain other important cited 'characteristics' by Dr. Froot." (*Id.* ¶ 25(b).) And with respect to the AIG transaction, Love states, "Again, Dr. Froot cites a proposed security which has characteristics more similar to indexed options traded on the Chicago Board of Trade than the IGF technology." (*Id.* ¶25(d).) These empty assertions by one of Plaintiff's own principals do not create a genuine issue of material fact.

Second, Morgan Stanley points to an article co-authored by its expert Dr. Froot entitled "The Emerging Asset Class: Insurance Risk," which it contends discusses all four characteristics in which IGF claims a proprietary interest. (Froot 12/17/97 Aff. ¶¶ 9-15 and Ex. A). The article was published in July 1995, but Dr. Froot says, "Early drafts of that article, with all of the main ideas in place, were being circulated among the authors, and had been read by others, by May 1995." (Froot 12/17/97 Aff. ¶ 11.)[4] Dr. Love says that Dr. Froot's article does not discuss the elements of IGF's

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knew anything about it. I have asked them to investigate further for information on this transaction; to date, no one at Lehman Bros. seems to know anything about it." This investigation is obviously too cursory to be given weight. Szal's statement is also hearsay and is disregarded.

[4] Dr. Froot's article was not the only one describing certain ideas claimed to be proprietary by IGF. See, e.g., Michael Quint, *Insurers Seek New ways to Cover Catastrophes, The Journal Report (Oklahoma City)*, May 16, 1995 (1995 WL 6382210); Gavin Souter, *News, Business Insurance*, July 17, 1995, at 2 (1995 WL 7497313). (Froot 4/17/98 Repl. Aff. Ex.'s 15, 19).

proprietary system. (Love Decl. ¶¶ 17-22). However, IGF never specifies exactly how its system differs from the concepts detailed in Dr. Froot's article. Nor does IGF deny that the four concepts identified by IGF as being key to its proprietary system (Coch Decl. Ex. A at 4-5) were included in some form on Froot's article. (Love Decl. ¶ 21; Froot 4/17/98 Repl. Aff. ¶¶ 6-16.) This is not sufficient to raise a genuine issue of material fact as to the novelty of Plaintiff's system.

Finally, Morgan Stanley argues that as of June 1995 there were financial products in existence with the same characteristics as IGF's system including Brady Bonds, senior-subordinated asset backed securities, and collateralized mortgage obligations. (Froot 12/17/97 Aff. ¶¶ 16-33, 36; Froot 4/17/98 Repl. Aff. ¶¶24-43.) Dr. Froot describes how each of these financial products contained the four characteristics which appear to be the essential elements of Plaintiff's "total integrated system" as described in its answers to Defendant's interrogatories. (*Id.*) Plaintiff counters only in general terms that "the cited examples do not contain important return/risk and legal/security features which are integral to the IGF technology," without detailing what other features are integral to that technology. (Love Decl. ¶¶24, 26-27.) Its says, without explanation, that IGF proprietary technology is not a CAT bond or any other instrument asserted by Dr. Froot. (Love Aff. ¶ 15-17.)[5] These

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[5] IGF claims that Dr. Froot did not analyze further submissions that Morgan Stanley allegedly made to the CEA in December 1995 and January 1996 and that he thus did not notice that the "elements of [IGF's proprietary] technology were progressively integrated into" Morgan Stanley's later proposals. (Love Decl. ¶ 27.) "It appears that the iterative nature of Morgan Stanley's pursuit of the CEA began in August 1995 with the promotion of its PERC and, as problems arose, the IGF technology served as a textbook for resolving securities, tax, accounting and regulatory issues, as well as improving marketability." (*Id.*) This is a conclusory, self-serving assertion by one of Plaintiff's principals and does not raise a genuine issue of material fact.

assertions, without evidentiary support. do not raise genuine issues of material fact.

In essence, Plaintiff chose not to challenge Dr. Froot's expert report during discovery in any attempt to narrow the issues but hopes to go to trial without ever stating in what way its proprietary information differs from Dr. Froot's analysis. Even on this motion Plaintiff never states with any degree of factual specificity what exactly its proprietary technology *is*. It complains that Defendant takes four elements out of IGF's 16 page explanation (the interrogatory answer, Coch Decl. Ex. A) but ignores the rest. And it says that the proprietary technology consists of much more than what was in the interrogatory answer. Only that which is on the record may be considered by the Court in ruling on a motion for summary judgment. While it may be the case that IGF owns some measure of proprietary technology with respect to securitization of catastrophic risks, nothing on the record in this case indicates that. And though Defendant has focused its analysis on a small aspect of IGF's interrogatory response, that is all that was required here, as the remainder of that response adds no detail or helpful explanation. Quite simply, IGF has failed to articulate precisely what proprietary technology it had which Morgan Stanley allegedly misappropriated. In such circumstances, summary judgment for Defendant is appropriate.

C. *Competitive Advantage*

Defendant next argues that any use of IGF's system by Morgan Stanley is not actionable because the information behind the system did not afford IGF with "an actual or potential economic advantage over others." Restatement (Third) of Unfair Competition § 39 (1995); *see Julie Research Labs, Inc. v. Select Photographic Engineering, Inc.*, 810 F. Supp. 513, 517 (S.D.N.Y. 1992) ("A trade secret can be anything used in one's business which gives an advantage over competitors who do not know or use it."), *aff'd in part, rev'd in part on other grounds*, 998 F.2d 65 (2d Cir. 1993).

Morgan Stanley argues that because the idea was widely developed in the industry, it was existing knowledge, and not a trade secret. That the idea was widely developed in the industry is demonstrated by the fact that the proposals submitted by nine other investment banks to the CEA contained features similar to the features contained in the Morgan Stanley proposal; in fact, the proposals of two of the other banks, CS First Boston and Goldman Sachs, contained all relevant characteristics of the IGF system. (Froot 11/5/97 Aff. ¶ 16 and Ex.'s L, M, N.) Thus, no competitive advantage existed from the IGF information.

Plaintiff contends that five of the other nine banks--First Boston, Goldman Sachs, Donaldson Lufkin & Jenrette, Salomon Brothers, and JP Morgan--had received information from IGF about its system under "confidentiality, proprietary, trade secrets acceptance conditions." King Decl. ¶ 28, n. 17; Szal Decl. ¶¶ 5, 6, 7, 13, 14.) Plaintiff has provided no evidence to support that argument in its opposition to the motion for summary judgment other than the statements of its principal, Chairman and CEO Douglas King, and its agent, Assistant to the Chairman Dennis Szal. In his declaration, King disputes Froot's analysis and

conclusions. According to King, the proposals from the group of banks that did not have access to the IGF system were substantially dissimilar from Morgan Stanley's proposal (King Decl. ¶¶39-44), whereas the proposals from the group that received information about the IGF system contained more similarities, but still significant differences. (*Id.* ¶¶ 87-94.) King's point is non-responsive to Defendant's claims that Plaintiff's "technology" was in the public domain.

While Morgan Stanley initially won the right to serve as senior managing underwriter on the CEA project, the CEA later abandoned the securitization idea and chose to pursue a more traditional reinsurance scheme. Thus, it can hardly be said that IGF would have had an actual or potential economic advantage from its system, assuming that Morgan Stanley misappropriated it. IGF argues that Morgan Stanley did not fully understand the IGF "technology" that it had misappropriated, which is why the CEA eventually abandoned Morgan Stanley's proposal, but there is no explanation of what was misunderstood and no evidence to support IGF's statement. IGF also contends that Morgan Stanley did in fact gain an advantage, despite the ultimate action by the CEA, because it won a "beauty pageant" of over 40 investment banks, leading to "untold additional investment banking business and insurance opportunities." (Szal Decl. ¶ 18.) IGF has offered no evidence to support the beauty pageant contention nor any evidence demonstrating any economic gains to Morgan Stanley as a result.

II. Plaintiff's Motion to Supplement the Record

On July 2, 1998, 17 days after the June 15, 1998 oral argument, Plaintiff filed a motion to supplement the record, seeking to call to the Court's attention two Harvard Business School case studies co-authored by Dr. Froot and to submit additional interrogatory answers. This motion to supplement the record is denied as untimely and not provided for under Local Civil Rule 6.1(b).

Plaintiff claims that in the two case studies, Dr. Froot contradicts the affidavits filed in this case by saying that "deals involving true risk transfer, a principle element of IGF's proprietary technology, first occurred in 1997, not 1995." (King Supp. Decl. ¶ 6.) There is no reason to accept this submission form IGF. The issue here is whether the concept was novel, not whether deals involving the concept had been consummated. Furthermore, one of the case studies was listed on Dr. Froot's resume which was made available to IGF in December 1997, and the other was published in March 1998, well prior to argument. As noted above, Plaintiff never took Dr. Froot's deposition, during which time counsel could have explored any alleged contradiction.

As for the late submission of additional answers to interrogatories, IGF was fully aware of the arguments Morgan Stanley raised in the motion for summary judgment and should have submitted a complete response as part of its opposition to the motion. In a letter to the Court accompanying the motion to supplement the record, counsel for IGF states, "I am submitting the full answers to the interrogatories with copies of the documents included by reference because, at oral argument, Morgan Stanley appeared to argue that the entire scope of IGF's claimed proprietary information was limited to paragraphs a) through d) on pages 6 and 7 of the answer to interrogatory 1." (Bain 7/1/98 Ltr. at 1.) However, this argument by Morgan Stanley

was first raised in its papers in support of its motion for summary judgment on December 17, 1997, not at oral argument on June 15, 1998.

The full interrogatory answers are neither helpful to the Court nor supportive of Plaintiff's position in opposition to Defendant's summary judgment motion. Permission to file supplemental papers is discretionary, *Old Republic Insurance Co. v. Hansa World Cargo Service, Inc.*, 170 F.R.D. 361, 369 (S.D.N.Y. 1997), and in this case it is denied.

Judgment shall be entered by the Clerk of the Court for the Defendant.

IT IS SO ORDERED:

Dated: New York, New York
December 23, 1998

/s/
Robert P. Patterson, Jr.
U.S.D.J.

No. 99-7080

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INVESTORS GUARANTY FUND, LTD., an exempt Limited Liability Company of the Islands of Bermuda,

Plaintiff-Appellant,

- v. -

MORGAN STANLEY & CO., INC., a corporation of the State of Delaware,

Defendant-Appellee,

JOHN DOES 1 THROUGH 10, being fictitious names for persons whose identities are unknown,

Defendants.

November 1, 1999, Decided

COUNSEL: Appearing for Appellant: John N. Bain, Carella, Byrne, Bain, Gilfillan, Cecchi, Stewart & Olstein (Mark D. Miller of counsel), Roseland, New Jersey.

Appearing for Appellee: C. Joseph Laughon, II, Rogers & Wells LLP (Robert Penchina, Joanne M. Scalard, Darren Rosenblum, of counsel), New York, New York.

JUDGES: Present: HONORABLE RALPH K. WINTER, Chief Judge, HONORABLE JON O. NEWMAN, HONORABLE JOHN M. WALKER, JR., Circuit Judges.

OPINION: SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Judgment of the District Court is hereby AFFIRMED.

Investors Guaranty Fund appeals from Judge Patterson's adverse grant of summary judgment. We affirm for substantially the reasons stated by the district court. See No. 96 Civ. 3520, 1998 WL 906577 (S.D.N.Y. Dec. 29, 1998).